



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAR 03 2008

REPLY TO THE ATTENTION OF:

(AE-17J)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas W. Dimond
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

Dear Mr. Dimond:

Enclosed is a file stamped Consent Agreement and Final Order (CAFO) which resolves Kerry Inc. CAA Docket No.

CAA-05-2008-0008. As indicated by the filing stamp on its first page, we filed the CAFO with the Regional Hearing Clerk on MAR 03 2008.

Pursuant to Paragraph 30 of the CAFO, Kerry Inc. must pay the \$169,822.80 civil penalty within 30 days of the date the CAFO was filed, 3/03/08. The check must display the case docket number, **CAA-05-2008-0008**, and the billing document number, 2750803A007.

Please direct any questions regarding this case to Cynthia A. King, Associate Regional Counsel, (312) 886-6831.

Sincerely yours,

Brent Marable, Chief
Air Enforcement and Compliance Assurance Section (IL/IN)

Enclosure

Cc: Ray Pilapil, Manager
Bureau of Air, Compliance and Enforcement Section
Illinois Environmental Protection Agency

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. CAA-05-2008-0008
)	
Kerry Inc.)	Proceeding to Assess a Civil Penalty
Millstadt, Illinois,)	Under Section 113(d) of the Clean Air
)	Act, 42 U.S.C. § 7413(d)
Respondent.)	
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Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 22.13(b), and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), as codified at 40 C.F.R. Part 22.
2. Complainant is the Director of the Air and Radiation Division, U. S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Kerry Inc. (Kerry or Respondent), a corporation doing business in Illinois.
4. Pursuant to 40 C.F.R. § 22.13(b), where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

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6. Kerry consents to entry of this CAFO and the assessment of the specified civil penalty, and agrees to comply with the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Kerry admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in the CAFO.

8. Kerry waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 608 of the Act, 42 U.S.C. § 7471g, requires the Administrator of EPA to promulgate regulations establishing standards and requirements regarding the use and disposal of "Class I" and "Class II" ozone-depleting substances.

10. On May 14, 1993, in accordance with Section 608 of the Act, EPA promulgated regulations at 40 C.F.R. Part 82, Subpart F, applicable to Recycling and Emissions Reduction (the Subpart F regulations).

11. 40 C.F.R. § 82.150(b) provides that the Subpart F regulations apply to any "person" servicing, maintaining, or repairing "appliances," as those terms are defined at 40 C.F.R. § 82.152.

12. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(2), require that an owner or operator of industrial process refrigeration equipment normally containing more than 50 pounds of refrigerant must have leaks repaired if the appliance is leaking at a rate such that the loss of refrigerant will exceed 35 percent of the total charge during a 12-month period. Repairs must bring annual leak rates to below 35 percent during a twelve month period.

13. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(9), require that owners or operators of industrial process refrigeration equipment must repair leaks pursuant to 40 C.F.R. § 82.156(i)(2) within 30 days after discovery of the leak.

14. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(3), require that an owner or operator of industrial process refrigeration equipment conduct a follow-up verification test within 30 days after the initial verification test.

15. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(6), state that an owner or operator of industrial process refrigeration equipment are not required to repair a leak if they develop a one-year retrofit and retirement plan within 30 days of discovering the exceedance of the applicable leak rate or within 30 days of a failed follow-up verification test. The plan must be dated and kept at the site of the appliance.

16. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(3)(ii), require that an owner or operator of industrial process refrigeration equipment must retrofit or retire such equipment within one year of failing the follow-up verification test.

17. The Subpart F regulations, at 40 C.F.R. § 82.156(i)(3)(iii), require that an owner or operator of industrial process refrigeration equipment that fails a follow-up verification test must notify EPA within 30 days of the failed follow-up verification test.

18. The Administrator of EPA (the Administrator) may assess a civil penalty of up to \$27,500 per day of violation up to a total of \$220,000 for violations that occurred from January 31, 1997 through March 15, 2004, and may assess a civil penalty of up to \$32,500 per day of violation up to a total of \$270,000 for violations that occurred after March 15, 2004, under Section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. Part 19.

19. Pursuant to 42 U.S.C. § 7413(d)(1) and 40 C.F.R. Part 19, the Administrator may assess a penalty greater than \$270,000 where the Administrator and the Attorney General of the United States jointly determine that a matter involving a larger penalty is appropriate for an administrative penalty action.

20. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that this matter involving a penalty greater than \$270,000 is appropriate for an administrative penalty action.

21. Section 113(d)(1) limits the Administrator's authority to matters where the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action, except where the Administrator and the Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

22. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violations alleged in this CAFO.

Factual Allegations and Alleged Violations

23. Kerry owns and operates a bread crumb manufacturing facility in Millstadt, Illinois (the Facility). The Facility contained six industrial process refrigeration units with normal charges of over 50 pounds, including the following units: North West Dehumidifier, South West Dehumidifier, South East Dehumidifier, and the North East Dehumidifier.

24. The four industrial process refrigeration units referenced above were "appliances," as defined in 40 C.F.R. § 82.152, and used the class II refrigerant R-22.

25. Between June 1, 2001 and June 1, 2006, the North West Dehumidifier, South West Dehumidifier, South East Dehumidifier and North East Dehumidifier, all experienced leaks that resulted in an annual leak rate exceeding 35 percent, in violation of 40 C.F.R. § 82.156(i)(2) and Section 608 of the Act, 42 U.S.C. § 7471g.

26. Between June 1, 2001 and June 1, 2006, at the North West Dehumidifier, South West Dehumidifier, South East Dehumidifier and North East Dehumidifier, Kerry failed to perform follow-up verification tests to verify that the repairs performed on the units had brought the leak rates to below 35 percent in violation of 40 C.F.R. § 82.156(i)(3) and Section 608 of the Act, 42 U.S.C. § 7471g.

27. Between June 1, 2001 and June 1, 2006, at the North West Dehumidifier, South West Dehumidifier, South East Dehumidifier and North East Dehumidifier, Kerry failed to develop a retrofit or retirement plan when repairs performed on the units were unable to bring the leak rate below 35 percent in violation of 40 C.F.R. § 82.156(i)(6) and Section 608 of the Act, 42 U.S.C. § 7471g.

28. Between June 1, 2001 and June 1, 2006, at the North West Dehumidifier, South West Dehumidifier, South East Dehumidifier and North East Dehumidifier, Kerry failed to retrofit or retire the units within one year following an exceedance of the applicable leak rate or a failed follow-up verification test in violation of 40 C.F.R. § 82.156(i)(3)(ii) and Section 608 of the Act, 42 U.S.C. § 7471g.

29. Between June 1, 2001 and June 1, 2006, Kerry failed to notify EPA of failed follow-up verification tests at the North West Dehumidifier, South West Dehumidifier, South East Dehumidifier and North East Dehumidifier, in violation of 40 C.F.R. § 82.156(i)(3)(iii) and Section 608 of the Act, 42 U.S.C. § 7471g.

Civil Penalty

30. Based on analysis of the factors specified in Section 113(e) of the Act, 42 U.S.C. § 7413(e), the facts of this case, Kerry's cooperation, prompt return to compliance, and agreement to perform a supplemental environmental project, Complainant has determined that an appropriate civil penalty to settle this action is \$169,822.80.

31. Within 30 days after the effective date of this CAFO, Kerry must pay a \$169,822.80 civil penalty by one of the following methods:

- a. sending a cashier's or certified check payable to the "Treasurer, United States of America," and noting the case name, docket number of this CAFO and the billing document number; or
- b. an electronic funds transfer, the funds payable to the "Treasurer, United States of America," and noting in the comment or description field of the electronic funds transfer, state the case name, the docket number of this CAFO and the billing document number.

32. For checks sent by regular U.S. Postal Service mail, the check should be sent to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

33. For checks sent by express mail, the check should be sent to:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

34. For electronic funds transfer, the funds should be wired to:

Federal Reserve Bank of New York
ABA No. 021030004

Account No. 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D68010727 Environmental Protection Agency"

34. If paying by check, Kerry must include a transmittal letter that accompanies the payment and which states the case name, the case docket number, and the billing document number. Kerry must send a copy of the check and transmittal letter to:

Attn: Regional Hearing Clerk, (E-13J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Attn: Compliance Tracker, (AE-17J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Cynthia A. King, (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

35. This civil penalty is not deductible for federal tax purposes.

36. If Kerry does not pay timely the civil penalty, or any stipulated penalties due under Paragraph 48, below, EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States' enforcement expenses for the collection action under Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

37. Pursuant to 31 C.F.R. § 901.9, Kerry must pay interest on any overdue amount

from the date payment was due at a rate established by the Secretary of the Treasury. Kerry must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Kerry must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue according to Section 113(d)(5) of the Act, 42 U.S.C.

§ 7413(d)(5). This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter.

Supplemental Environmental Project

38. Kerry must complete a supplemental environmental project (SEP) designed to protect the environment and public health by reducing the amount of ozone-depleting substances that may be released into the environment.

39. At its Jackson and Sturtevant, Wisconsin facilities, Kerry must complete the SEP as follows:

- a. at its Jackson facility, unit J1-Circuit 1, Kerry will replace the ozone-depleting refrigerant with equipment using a non-ozone depleting refrigerant within two (2) years of the effective date of this CAFO;
- b. at its Jackson facility, unit J1-Circuit 2, Kerry will replace the ozone-depleting refrigerant with a non-ozone depleting refrigerant within one (1) year of the effective date of this CAFO;
- c. at its Jackson facility, for two units that are less than 50 pound units, Kerry will replace the ozone-depleting refrigerant with a non-ozone depleting refrigerant within two (2) years of the effective date of this CAFO; and
- d. at its Sturtevant facility, for sixteen units that are less than 50 pound units, Kerry will replace the ozone-depleting refrigerant with a non-ozone depleting refrigerant within two (2) years of the effective date of this CAFO.
- e. "Non-Ozone Depleting Refrigerant," as that term is used in this CAFO, means any refrigerant which is not regulated under Subchapter VI of the Act, 42 U.S.C. §§ 7671-7671q, or EPA's Subpart F Regulations, as a Class I or Class II known or suspected ozone-depleting substance, and is approved as a substitute by EPA under 40 C.F.R. Part 82, Subpart G, with such regulatory classification determined as of the date an appliance which uses an ozone-depleting substance is

converted to use a Non-Ozone Depleting Substance.”

40. Kerry must spend at least \$811,097 to purchase the equipment described in Paragraph 39.

41. Kerry certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief prior to its execution of this CAFO. Kerry further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

42. EPA may inspect the facilities at any time to monitor Kerry’s compliance with this CAFO’s SEP requirements.

43. Kerry must submit a SEP completion report to EPA within 60 days of completion of the SEP. This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any operating problems and the actions taken to correct the problems;
- c. Itemized costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders, or cancelled checks that specifically identify and itemize the individual cost of the goods and services;
- d. Certification that Kerry has completed the SEP in compliance with this CAFO; and
- e. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

44. Kerry must submit all notices and reports required by this CAFO by first class mail to:

Attn: Compliance Tracker (AE-17J)
Air Enforcement and Compliance Assurance Branch
Air and Radiation Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

45. In each report that Kerry submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

46. Following receipt of the SEP completion report described in Paragraph 43, above, EPA must notify Kerry in writing that:

- a. It has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report and EPA will give Kerry 30 days to correct the deficiencies; or
- c. It has not satisfactorily completed the SEP or the SEP report and U.S. EPA will seek stipulated penalties under Paragraph 48.

47. If EPA exercises option b. or c., above, Kerry may object in writing to the deficiency notice within 15 days of receiving the notice. The parties will have 30 days from EPA's receipt of Kerry's objection to reach an agreement. If the parties cannot reach an agreement, EPA will give Kerry a written decision on its objection. Kerry will comply with any requirement that EPA imposes in its decision. If Kerry does not complete the SEP as required by EPA's decision, Kerry will pay stipulated penalties to the United States under Paragraph 48, below.

48. If Kerry violates any requirement of this CAFO relating to the SEP, Kerry must pay stipulated penalties to the United States as follows:

- a. If the SEP is not completed satisfactorily, but Kerry: i) made good faith and timely efforts to complete the project; and ii) certifies, with supporting documentation, that at least 90% of the amount of money which was required to be spent, as set forth in Paragraph 40, was expended on the SEP, no stipulated penalty is necessary;
- b. If the SEP is satisfactorily completed, but Kerry spent less than 90 percent of the amount of money required to be spent for the project, as set forth in Paragraph 40, Kerry shall pay a stipulated penalty of \$1 for each dollar by which the amount expended fell short of the 90% of the amount required to be spent under Paragraph 40, up to a maximum stipulated penalty of \$50,946.83;
- c. If Kerry completed the SEP but the SEP is not satisfactory, or if Kerry halts or abandons work on the SEP, Kerry must pay \$382,101.20;
- d. If Kerry fails to comply with the schedule in Paragraph 39, above, for implementing the SEP or fails to submit timely the SEP completion report required by Paragraph 43, above, then Kerry must pay stipulated penalties for each failure to meet an applicable milestone, as follows:

<u>Penalty per violation per day</u>	<u>Period of violation</u>
\$200	1 st through 14 th day
\$400	15 th through 30 th day
\$600	31 st day and beyond

These penalties will accrue from the date Kerry was required to meet each milestone until it achieves compliance with the milestone, except that the maximum stipulated penalty for any single failure shall be \$32,500.

49. EPA's determination of whether Kerry satisfactorily completed the SEP will bind Kerry.

50. Kerry must pay any stipulated penalties within 30 days of receiving EPA's written demand for the penalties. Kerry will use the method of payment specified in Paragraphs 31 through 34, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

51. Any public statement that Kerry makes referring to the SEP must include the following language, "Kerry Inc. undertook this project as part of the settlement of the United

States Environmental Protection Agency's enforcement action against Kerry Inc. for violations of the Clean Air Act."

General Provisions

52. This CAFO resolves only Kerry's liability for federal civil penalties for the facts and violations alleged in this CAFO.

53. The CAFO does not affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

54. This CAFO does not affect Kerry's responsibility to comply with the Act and other applicable federal, state, and local laws. Except as provided in Paragraph 52, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by Complainant.

55. Kerry certifies that it is complying fully with 40 C.F.R. Part 82, Subpart F.

56. This CAFO constitutes an "enforcement response" as that term is used in EPA's *Clean Air Act Stationary Source Civil Penalty Policy* to determine Kerry's "full compliance history" under Section 113(e) of the Act, 42 U.S.C. § 7413(e).

57. The terms of this CAFO bind Kerry, its successors, and assigns.

58. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

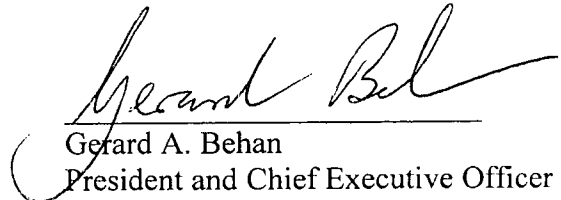
59. Each party agrees to bear its own costs and attorneys' fees in this action.

60. This CAFO constitutes the entire agreement between the parties.

61. The effective date of this CAFO is the date on which the Final Order it is signed by the Regional Administrator or her designee.

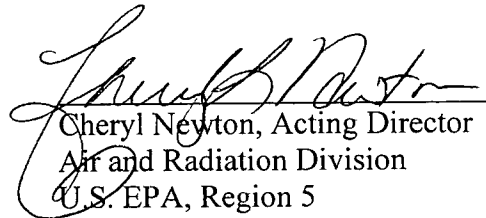
Kerry Inc., Respondent

2-1-08
Date


Gerard A. Behan
President and Chief Executive Officer
Kerry Inc.

United States Environmental Protection Agency, Complainant

2/26/08
Date


Cheryl Newton, Acting Director
Air and Radiation Division
U.S. EPA, Region 5

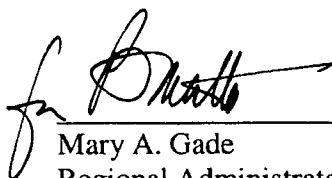
CONSENT AGREEMENT AND FINAL ORDER
In the Matter of: Kerry Inc., Millstadt, Illinois
Docket No.

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Date

2-28-08



Mary A. Gade
Regional Administrator
U.S. Environmental Protection
Agency, Region 5

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In the Matter of Kerry Inc.
Docket No: CAA-05-2008-0008

CERTIFICATE OF MAILING

I, Betty Williams, certify that I hand delivered the original of the Consent Agreement and Final Order, docket number CAA-05-2008-0008 to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, and that I mailed correct copies by first-class, postage prepaid, certified mail, return receipt requested, to Kerry Inc. Counsel by placing them in the custody of the United States Postal Service addressed as follows:

Mr. Thomas W. Dimond
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

I also certify that a copy of the CAFO was sent by first-class mail to:

Ray Pilapil, Manager
Bureau of Air, Compliance and Enforcement Section
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62706

on the 3rd day of March 2008.

Betty Williams

Betty Williams, Secretary
AECAS (IL/IN)

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